Supreme Court, U.S.
FILED

No. 93-

931341 FEB 22 1994

IN THE

# Supreme Court of the United States

OFFICE OF THE CLERK

OCTOBER TERM, 1993

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WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
*Petitioners,*

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania**

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## PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED

Under section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3, the Federal Energy Regulatory Commission ("FERC") has promulgated rules governing the rates to be set by state public utility commissions for purchases of electricity by utilities from the developers of "qualifying facilities." PURPA and the FERC rules require that those rates be "just and reasonable" to a utility's consumers, and not greater than a utility's "avoided costs." The rules also encourage freely-negotiated purchase agreements between utilities and developers that are not subject to the federal regulatory scheme. In this case, the Pennsylvania Public Utility Commission and reviewing courts, in conflict with rulings from other state courts of last resort, have exercised presumed "plenary powers" under PURPA to override the terms of a negotiated agreement, notwithstanding the FERC rules, and have granted a substantial windfall to a developer by calculating the utility's avoided costs as of the date of an agreement that lapsed by its own terms years ago. The questions presented are:

1. Whether state commissions have been granted broad powers under PURPA to modify the terms of privately-negotiated purchase agreements, and to excuse developers from meeting their contractual obligations to satisfy reasonable milestones for the financing and construction of their proposed facilities; and

2. Whether state commissions, in determining the date on which a utility's avoided costs are to be calculated under PURPA, may decide that a "legally enforceable obligation" to deliver energy existed as of the date of a lapsed agreement, when the use of that date results in rates that exceed the utility's avoided costs, and that are not "just and reasonable" to the utility's customers.

## LIST OF PARTIES AND RULE 29.1 LIST

In the Supreme Court of Pennsylvania, the petitioners' separate appeals from orders of the Commonwealth Court were consolidated with an appeal filed by respondent Pennsylvania Public Utility Commission. Three developers who have sought to sell electric power to petitioner West Penn Power Company, pursuant to the provisions of PURPA, intervened in the proceedings below. They are respondents Milesburg Energy, Inc., Mon Valley Energy Corporation and North Branch Energy Partners, L.P. Respondent Milesburg Energy, Inc. is the developer of the "qualifying facility" at issue in this Petition.

Petitioner West Penn Power Company is a wholly owned subsidiary of Allegheny Power System, Inc. West Penn has two subsidiaries that are not wholly owned by it: Allegheny Generating Company and Allegheny Pittsburgh Coal Company.

Petitioner Armco Advanced Materials Company is a wholly owned subsidiary of Armco, Inc. It has no subsidiaries that are not wholly owned.

Petitioner Allegheny Ludlum Corporation has neither a parent company nor subsidiaries that are not wholly owned.

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*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania**

## PETITION FOR A WRIT OF CERTIORARI

Petitioners West Penn Power Company, Armco Advanced Materials Company and Allegheny Ludlum Corporation respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in this matter on November 24, 1993.

## OPINIONS BELOW

The November 24, 1993 order of the Pennsylvania Supreme Court affirming, by equally divided court, the opinion and order of the Commonwealth Court of Pennsylvania, and a concurring and dissenting opinion, are reprinted in Appendix A, at 1a-17a. The order and opinion are reported at 634 A.2d 207. The opinion and orders of the Commonwealth Court, filed on July 17, 1990, are reported at 135 Pa. Commw. Ct. 15, 579 A.2d 1337, and reprinted in Appendix B, at 18a-46a. Application for reargument was denied in an unreported order of the Commonwealth Court reprinted in Appendix C, at 47a.

This case commenced with an unreported order of respondent Pennsylvania Public Utility Commission ("PUC") approving an agreement dated February 25, 1987 between petitioner West Penn Power Company ("West Penn") and respondent Milesburg Energy, Inc. ("Milesburg") for the purchase of power. The September 22, 1987 PUC order is reprinted in Appendix D, at 48a-59a. On August 22, 1988, the Pennsylvania Commonwealth Court vacated that PUC order and remanded for a hearing on the question whether the power purchase agreement was in the public interest. The Commonwealth Court's opinion, reported as *Barasch* v. *Pennsylvania Public Utility Commission,* 119 Pa. Commw. Ct. 81, 546 A.2d 1296, is reprinted in Appendix E, at 60a-90a. On petition for reargument, the Commonwealth Court modified its opinion so that it would have prospective effect only. The modification is reported at 119 Pa. Commw. Ct. 115, 550 A.2d 257, and reprinted in Appendix G, at 97a-98a.

Following remand to the PUC, the parties entered into an unreported consent order, extending certain milestone dates under the agreement to February 28, 1989. The consent order is reprinted in Appendix F, at 91a-96a. The PUC next consolidated this case with several others related to proposed power purchase agreements between West Penn and developers of "qualifying facilities." The consolidation order of January 19, 1989 is reprinted in Appendix H, at 99a-109a, and is reported at 69 Pa. P.U.C. 124. West Penn's contract with Milesburg expired by its own terms on February 28, 1989. The Administrative Law Judge ("ALJ") assigned to this matter initially ordered that the contract milestone dates should be extended, but later rescinded that order. Those unreported orders are reprinted in Appendices I and J, at 110a-113a. The PUC then entered an order directing the parties to maintain the status quo with respect to the contract milestone dates pending the completion of the PUC proceedings. That order, entered on March 31, 1989, is reprinted in Appendix K, at 114a-126a, and is reported at 69 Pa. P.U.C. 343.

On June 27, 1989, the ALJ issued an unreported recommended decision in the consolidated cases, reprinted in Appendix L, at 127a-230a. With respect to the Milesburg agreement, the ALJ determined that West Penn should be permitted to withdraw its 1987 petition for approval of the expired contract. At a public meeting on September 21, 1989, the PUC, by divided vote, rejected the ALJ's recommended decision. The unreported motion and the dissenting and concurring statements of the Commissioners are reprinted in Appendix M, at 231a-243a. On September 29, 1989, the PUC entered a formal Order directing West Penn to enter into a new agreement with Milesburg, which is reported at 71 Pa. P.U.C. 60, 106 P.U.R. 4th 459, and reprinted in Appendix N, at 244a-294a. The dissenting opinion of Commissioner Fischl is reported at 110 P.U.R. 4th 37, and is reprinted in Appendix O, at 295a-299a.

## JURISDICTION

The order of the Pennsylvania Supreme Court was entered on November 24, 1993. This Petition is filed within ninety days of the entry of that judgment, and is timely pursuant to Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## STATUTES AND REGULATIONS INVOLVED

This case involves legal issues arising under section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3, and the regulations implemented thereunder by the Federal Energy Regulatory Commission ("FERC"), particularly those set forth at 18 C.F.R. §§ 292.301 and 292.304 (1993). These provisions of federal law are reprinted in Appendices P and Q respectively, at 300a-312a. The PUC also has adopted regulations implementing PURPA, as required by the federal statute. The pertinent provisions of the PUC's rules, 52 Pa. Code § 57.32 (1983), are set forth in Appendix R, at 313a-314a.

## STATEMENT OF THE CASE

### A. Introduction.

This case involves the interplay of provisions of PURPA and the FERC rules that require utilities to offer to purchase electric energy from "qualifying facilities" at not more than the "avoided costs for such purchases," *see* 16 U.S.C. § 824a-3(b) and 18 C.F.R. § 292.304(a)(2), and the FERC rules that permit electric utilities and qualifying facilities to negotiate freely for contractual terms and conditions different from those imposed by regulatory mandate. *See* 18 C.F.R. § 292.301(b). In a nutshell, the Pennsylvania PUC, relying on powers purportedly derived from PURPA and the FERC rules, has "blended" these provisions and required West Penn, over its objection, to enter into a new contract with the developer of a qualifying facility, at a rate far in excess of its fully avoided costs for such purchases, in clear violation of the statutory directive of § 210(b) of PURPA, 16 U.S.C. § 824a-3(b). The PUC and the Pennsylvania courts have countenanced this violation of PURPA based on the fact that West Penn had agreed to the higher rate seven years ago, and had sought PUC approval for that rate, in the context of a freely-negotiated contract with the developer. But the parties' contract lapsed by its own terms, prior to the PUC order, as a result of regulatory delays, and the developer's inability to obtain financing for its planned facility in a timely fashion.

Although West Penn concedes that the PUC has the authority to order it to enter into a power purchase agreement with a qualifying facility, when it does so the purchase rate must be based on West Penn's "avoided costs calculated at the time of delivery; or . . . at the time the obligation is incurred," 18 C.F.R. § 292.304(d)(2)(i) & (ii), *i.e.*, the time of the PUC order. By failing to adhere to the federal statutory and regulatory scheme, the PUC has accorded windfalls of millions of dollars per year to the developer of this and other qualifying facilities, and has established rates for power purchases that are not "just and reasonable to the electric consumers of the elec-

tric utility and in the public interest," as required by PURPA, § 210(b)(1), 16 U.S.C. § 824a-3(b)(1).

The proceedings in the PUC and the Pennsylvania courts that have resulted in the current unlawful order for West Penn to enter into a new contract have been long and tortuous; petitioners summarize herein the facts material to this Court's consideration of the important issues of federal law that this Petition squarely presents.

**B. The Negotiated Agreement.**

On February 25, 1987, West Penn entered into an agreement with respondent Milesburg for the purchase of power from a planned 43 megawatt generating facility over a thirty year term, to commence *on or before March 31, 1990*. The parties contemplated that Milesburg would purchase from West Penn a retired power station, modify that facility to burn bituminous coal waste, and obtain certification from FERC that the station was a "qualifying facility" under PURPA. The contract, referred to as an Electric Energy Purchase Agreement ("Agreement"), required West Penn to purchase electric energy and capacity produced by the Milesburg facility, and to pay for energy at West Penn's "avoided cost energy rate" and for capacity at a levelized rate of 3.3¢ per kilowatt hour over the life of the contract. The capacity rate was based on West Penn's 1986 calculations of the levelized present value of its avoided capacity requirements over the thirty year term of the contract. *See* App. D, at 48a-49a.[1]

The Agreement contained a variety of conditions precedent to its taking effect, including certification of the Milesburg facility by FERC as a qualifying small power production facility, *see* 18 C.F.R. § 292.303(a); advance approval by the PUC of West Penn's ability to pass

[1] In 1986, West Penn's generating capacity plan projected the need for a portion of three 300 megawatt coal-fired base load units to be built by West Penn and its affiliates and to come on line during the period 1995 through 1998. The avoided capacity payments under the Milesburg Agreement were calculated based on the costs to be avoided by deferring construction of those units. *See* App. B, at 23a.

through to its customers the rates established in the contract; and an advance determination by the PUC that West Penn's addition of the Milesburg capacity would not result in a ratemaking adjustment for "excess capacity" under applicable Pennsylvania law, 66 Pa. Cons. Stat. § 1323. *See* App. D, at 50a. The Agreement also contained a series of "milestone dates," so that West Penn would be ensured that satisfactory progress was being made on the project, such that it could rely on Milesburg's commitment to deliver power, and could conduct appropriate generation planning to ensure adequate and continuous future service to its customers. The first critical milestone date under the Agreement was the September 1, 1988 deadline for Milesburg to close on its commitment for construction financing. Section 10.2 of the Agreement stated, in pertinent part:

> "If the Financing Closing Date shall not occur prior to September 1, 1988 for any reason whatsoever, including Force Majeure, this Agreement shall automatically terminate, in which case neither party shall have any further liability to the other hereunder." *See* App. F, at 92a.

On April 2, 1987, West Penn initiated a proceeding in the Pennsylvania PUC seeking advance approval for its rate recovery of the energy and capacity costs to be incurred under the Agreement, and a determination that the Milesburg capacity would not result in an adverse "excess capacity" adjustment. *See* App. D, at 50a. This petition was supported by respondent Milesburg, but opposed by the PUC's Office of Trial Staff, by West Penn's largest industrial customers, petitioners Armco Advanced Materials Company ("Armco") and Allegheny Ludlum Corporation ("Allegheny"), and by Pennsylvania's Office of Consumer Advocate (representing West Penn's customers). *Id.* at 50a-51a. The PUC, based on its past practice, determined that it was appropriate to afford advance ratemaking approval for utility contracts with "qualifying facilities" under PURPA, and granted the requested relief. *Id.* at 53a-54a, 58a-59a.

Petitioners Armco and Allegheny, and the Office of Consumer Advocate, then appealed. The Pennsylvania Commonwealth Court vacated the order and remanded the case to the PUC, holding that due process required notice to all of West Penn's ratepayers and a trial-type PUC hearing with respect to any advance approval of contract rates for energy and capacity, or any "excess capacity" determinations. *Barasch* v. *Pennsylvania Public Utility Comm'n*, 119 Pa. Commw. Ct. 81, 546 A.2d 1296 (1988). *See* App. E.

While the case was pending in the Commonwealth Court on petition for reargument,[2] the contractual deadline for Milesburg to close on its financing grew near. All parties to the PUC proceedings entered into a Consent Order, approved by the PUC on September 1, 1988, recounting: (1) that the time necessary for the PUC to conduct the hearing required by the Commonwealth Court would extend well beyond the financing closing date; (2) that West Penn believed that it could not prudently agree to an indefinite extension of the milestone dates because that would interfere with the orderly process of generation planning; and (3) that the parties therefore agreed to extend the milestone dates for a specified limited period, in order to give the PUC time to comply with the Commonwealth Court's order. *See* App. F, at 93a. Pursuant to the Consent Order, the financing closing date was extended to February 28, 1989 (and related milestone dates were "extended for a like period"). However, the Order expressly stated: "Should the Financing Closing Date not occur on or before February 28, 1989. the Agreement will automatically terminate . . . unless otherwise extended by further order of this Commission."

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[2] Recognizing that the due process questions presented in *Barasch* were issues of first impression, and that the PUC previously had approved utility contracts with qualifying facilities without notice and hearing, the Commonwealth Court determined on petition for reargument that its decision would have only prospective effect. *Barasch* v. *Pennsylvania Public Utility Comm'n*, 119 Pa. Commw. Ct. 115, 550 A.2d 257 (1988), *appeal denied*, 523 Pa. 652, 567 A.2d 655 (1989). *See* App. G.

*Id.* at 95a. In consideration for this relief, respondent Milesburg expressly agreed that it "shall not seek nor be entitled to any capacity credit higher than that specified in the Agreement executed on or about February 25, 1987." *Id.*

On January 19, 1989, the PUC consolidated the Milesburg petition with three other cases involving proposed power purchase agreements between West Penn and qualifying facilities. *See* App. H, at 108a. The cases were assigned to an ALJ for further proceedings. On February 10, 1989, respondent Milesburg filed with the ALJ an emergency petition to "reform" the Agreement by relieving Milesburg of the February 28, 1989 deadline for financing, by extending the financing deadline for an indefinite period not later than 120 days following the entry of a final and non-appealable PUC order approving the contract rates, and by adopting an "updated" capacity cost rate. The ALJ immediately granted this relief without awaiting answers from petitioners or the other parties to the proceedings. App. I, at 110a-112a. However, on February 27, 1989, the ALJ rescinded that order. App. J, at 113a. He later explained that he rescinded the first order "reforming" the contract because, under section 508 of the Public Utility Code, 66 Pa. Cons. Stat. § 508, such an order must be preceded by notice and hearing and cannot become effective for thirty days after it is entered. Thus, "my February 21, 1989 order was in error because there was no hearing and because even if a Commission order reforming the contract was entered on the day the petition was filed [February 10, 1989], it would not become effective under Section 508 until *after* the financing deadline elapsed [on February 28, 1989]." App. L, at 139a.

Respondent Milesburg then attempted to appeal the ALJ's refusal to "reform" the financing closing date, or to obtain similar relief from the PUC itself. At this point, West Penn asked the PUC to deny Milesburg's request for relief as moot because the Agreement had automatically expired on February 28, 1989, and because

Milesburg had sought to obtain increased capacity credits in violation of the express terms of the Consent Order. *See* App. K, at 119a. The PUC rejected Milesburg's request for an emergency order "reforming" the lapsed contract under the applicable Pennsylvania statute. Nonetheless, recognizing that in the absence of a negotiated contract the PUC might be confronted with the need to order West Penn to purchase energy from Milesburg in accordance with rates established under PURPA, the PUC directed the parties to maintain the status quo pending full consideration by the ALJ and PUC of Milesburg's petition to extend the milestone dates. App. K, at 122a-125a.

**C. The Consolidated Proceedings Before The PUC.**

The ALJ conducted eight days of hearings in April, 1989, with respect to four separate proposed energy purchase agreements between West Penn and the developers of qualifying facilities. He generated a voluminous Recommended Decision, reprinted in Appendix L. With respect to the Milesburg facility, however, the ALJ's recommendation was straightforward: he reiterated that by its own terms the Agreement terminated due to Milesburg's failure to close on financing for the project by February 28, 1989. Thus, there was no longer a contract before the PUC which could be modified or reformed under state law. *See* App. L, at 216a-217a. Milesburg also had argued that West Penn had a "legally enforceable obligation" to purchase energy from its qualifying facility under PURPA, without regard to the parties' contract. *Id.* at 218a. The ALJ correctly noted, however, that "[w]hile it appears that [West Penn] is required by PURPA to purchase power from [Milesburg], [West Penn] is not required to do so under the lapsed [Agreement]. To require [West Penn] to purchase its power, [Milesburg] must file a petition with the Commission to set rates . . . *under the provisions of the Commission's PURPA regulations.*" *Id.* (emphasis in original). The ALJ thus denied Milesburg's petition to modify the Agreement, and granted West Penn's request to withdraw

its original petition for PUC approval of the Agreement. *Id.* at 228a.

The Pennsylvania PUC reviewed the ALJ's Recommended Decision at a public meeting on September 21, 1989. By a divided vote, the PUC reversed the ALJ as to the status of the Milesburg Agreement. *See* App. M, at 235a-239a. The majority announced the PUC's intention to "require West Penn to execute a new contract with Milesburg, identical in most respects to the lapsed 1987 contract, with the financing date set six months after the receipt of a final and nonappealable Commission Order, with similar extensions to related milestones." *Id.* at 236a. The majority also granted Milesburg's request for an increased capacity rate under this "new contract," despite the Consent Order that seemingly had barred Milesburg from seeking or obtaining such an increase. *Id.* at 237a-238a. One of the four Commissioners dissented from the PUC's decision, *id.* at 241a, and another filed a separate statement expressing his "considerable reluctance" to join in the majority's decision, because "[i]n essence we are abrogating bona fide contracts that were willingly entered into by all parties." *Id.* at 242a.

The PUC issued a formal order on September 29, 1989, further explaining its reasoning. The majority stated that it agreed with the ALJ that because the Agreement had lapsed by its own terms, the PUC had no power under state law to modify it. App. N, at 287a. Nonetheless, the majority determined that West Penn had a legally enforceable obligation to purchase Milesburg's energy under § 210 of PURPA, and that the rates for that purchase must be "determined in accordance with West Penn's avoided cost projections in effect in 1986," *i.e.*, the same avoided cost projections that West Penn had used in negotiating the lapsed Agreement. *Id.* The PUC stated that it had a "responsibility to enforce the provisions of PURPA [§] 210 in Pennsylvania," *id.* at 288a, but failed to explain how its requirement that West Penn enter into a new agreement with Milesburg, with payments to be based on the avoided capacity cost cal-

culations applicable at the time of the old contract, was consistent with the specific statutory requirements imposed by PURPA.

Commissioner Fischl dissented from the PUC's Order. *See* App. O. The dissent first observed that if the Commission's PURPA *regulations* were properly applied to the Milesburg project, the developer might receive no capacity credits whatever. App. O, at 296a.[3] With respect to the Commission's treatment of the lapsed Agreement, the dissent argued that there was no authority for an order requiring West Penn to execute an identical new contract with the developer. Once the developer failed to meet the agreed milestones it had "waived its entitlement to previously available rates and is entitled only to rates based on 'later avoided cost projections.' " *Id.* at 297a. The dissent also contended that the PUC's order had shifted the risk of regulatory delay from respondent Milesburg (which had assumed that risk under the Agreement) to West Penn and its customers, who would now be charged with capacity rates far in excess of what the PURPA regulations required. *Id.* at 299a. Moreover, by extending the milestone dates indefinitely, the PUC had interfered with the ability of West Penn to plan rationally for its future generation needs. *Id.* Finally, "[t]his decision has eliminated the need for negotiated contracts. Developers [of qualifying facilities] can simply dictate terms and have the Commission order the utility to execute the appropriate contract." *Id.*

**D. The Decision Of The Commonwealth Court.**

Separate appeals from the PUC's Order were filed by West Penn and by Armco and Allegheny. The appeals

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[3] This observation was based on the fact that between 1986 and 1989 West Penn's forecasts for future capacity requirements had drastically changed. When the agreements were negotiated in 1986 West Penn and its affiliates were projecting the need to construct three expensive coal-fired base load generating units to be brought on line beginning in 1995. *See* footnote 1, *supra*. By 1989, West Penn's projections had changed, and shifted to the construction of less capital-intensive oil or gas-fired combustion turbines to be brought on line at later dates.

focused on the interrelated questions of federal law presented in this Petition: [4]

> "(1) whether the PUC had the authority to order payment to a QF [qualifying facility] of capacity credits reflecting avoided costs calculated at a time before the QF had made a commitment to deliver capacity, where the applicable FERC regulation requires calculation of avoided costs when the QF has incurred a 'legally enforceable obligation for the delivery of energy or capacity,' and (2) whether the PUC had the authority to order West Penn to enter into a new [agreement] with [Milesburg], after the first contract automatically terminated upon the expiration of a contract deadline, where the new contract has a higher but as yet undetermined capacity rate, and the parties previously executed a consent decree stating that [Milesburg] would not seek or be entitled to a higher capacity rate." App. B, at 20a (footnotes omitted).

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[4] The first issue was applicable to all four agreements considered in the consolidated PUC proceedings. In the case of another of these agreements, concerning the Shannopin cogeneration project, while review by the Commonwealth Court was pending in this case, the PUC granted the developer's request to enjoin West Penn from terminating the contract because of the developer's inability to post a good faith deposit as required by its agreement. The PUC also refused on remand to hold a hearing to allow West Penn to introduce evidence of its reduced avoided capacity costs. On subsequent review, the Commonwealth Court, by a four to three decision, affirmed the PUC's authority under PURPA to override the terms of the parties' contract, and to ignore current cost calculations. The dissenting judges accused the PUC and the court majority of having adopted a belief that PURPA "mandate[s] that QFs be built at all costs." *See West Penn Power Co.* v. *Pennsylvania Public Utility Comm'n*, 150 Pa. Commw. Ct. 349, 615 A.2d 951 (1992); *id.*, 615 A.2d at 966 (Pellegrini, J., dissenting). The Pennsylvania Supreme Court denied a petition for appeal from the Shannopin decision on December 30, 1993. Petitioners will be filing a timely petition for writ of certiorari with respect to the Shannopin decision, and suggest that this Court may wish to hold this Petition pending full consideration of the questions presented by both Petitions.

In addressing these questions, the Commonwealth Court first observed that the FERC regulations, 18 C.F.R. § 292.301(b), permit a utility and a qualifying facility to negotiate privately and agree to contract terms different from those otherwise prescribed by federal law. But the Court determined that West Penn, by conditioning its privately-negotiated Agreement with Milesburg on PUC approval, had transformed that Agreement into something other than "the private agreement contemplated by § 292.301(b)." *Id.* at 22a. That bit of judicial legerdemain, which had not been urged on the Court by any of the parties, became the foundation for the Court's opinion on both issues.

*First*, the Court rejected the PUC's long-standing interpretation that a utility's avoided costs must be calculated when "serious negotiations" with the developer commenced. The Court instead adopted a rule, urged upon it by petitioners Armco and Allegheny, that generally under FERC's regulations, 18 C.F.R. § 292.304(d), a "legally enforceable obligation" cannot be said to exist until the date when a contract is executed, binding the qualifying facility to deliver energy and capacity. App. B, at 28a-35a. Because, in the view of the Commonwealth Court, the Milesburg Agreement was not a pure private contract, the FERC rules had to be applied, and the PUC had to determine whether the capacity rates contained in the Agreement were less than West Penn's fully avoided costs as of February 25, 1987 (the date of the Agreement), rather than the date in 1986 when the parties first negotiated over rates.

*Second*, the Court held that the fact that the 1987 Agreement had lapsed by its own terms was of absolutely no consequence because the freely-negotiated Agreement was not, in reality, a freely-negotiated agreement. Without citing any authority, the Court held: "A utility's submission of its contract with a QF [qualifying facility] to the PUC for approval is legally equivalent to a petition by the QF to the PUC to compel the utility to enter into that

contract." *Id.* at 37a. According to the Commonwealth Court, because West Penn sought PUC approval of the contract rates contained in the Milesburg Agreement, "[t]he PUC must order a rate for such a purchase equivalent to the full avoided costs, 18 C.F.R. § 292.304(b)(2), and the PUC may not order terms or conditions for the purchase in any way contrary to the FERC regulations, or contrary to the goals of PURPA." *Id.* at 38a.

The Court then affirmed the power of the PUC to disapprove the milestone dates contained in the Milesburg Agreement, not under state law, but pursuant to "its federally delegated power under PURPA." *Id.* at 39a. In answering petitioners' argument that the elimination of fixed milestone dates destroyed West Penn's ability to conduct orderly capacity planning, the Court responded that "the PUC has full discretion in the exercise of its powers under PURPA and the FERC regulations to encourage the development of cogeneration and small power production to ensure that litigation delays do not become the factor that determines whether a project proceeds or fails." *Id.* at 39a-40a. This same reasoning justified the PUC's determination that West Penn should be required to make increased capacity payments to Milesburg, even though Milesburg had committed in the Consent Order not to seek such an increase. The Court held that common law contract principles had been overridden by unspecified provisions of federal law: "Where the PUC has the power under PURPA and the FERC regulations to order the execution of a new contract after the previous one expired, then it certainly has the power to withhold ongoing effect from the QF's agreement not to seek a capacity increase to which it might otherwise be entitled." *Id.* at 41a. Noting that its resolution of these issues involved questions of first impression under PURPA, the Court once again determined that its "decision shall have only prospective effect." *Id.* at 42a. West Penn's application for reargument was denied on September 13, 1990. *See* App. C.

**E. Proceedings In The Supreme Court Of Pennsylvania.**

West Penn, Armco and Allegheny, and respondent PUC, each petitioned for appeal of the Commonwealth Court's decision to the Pennsylvania Supreme Court. The petitions were granted on November 11, 1991. Petitioners specifically challenged the *sua sponte* holding of the Commonwealth Court, under PURPA and the FERC regulations, that a privately-negotiated power purchase agreement is transformed into the legal equivalent of an involuntary agreement ordered by the PUC, if the agreement is submitted to the PUC so that the utility may be assured of rate recovery. Petitioners also argued that, under the FERC regulations, the capacity rate to be paid to Milesburg should have been determined as of September 29, 1989, when the PUC ordered West Penn to enter into a new involuntary agreement, rather than the earlier date in February, 1987 when the parties executed the lapsed Agreement.

The Pennsylvania Supreme Court heard argument in September, 1992, but issued no ruling until November 24, 1993. That ruling was a per curiam order, affirming the judgment below by equally divided court. *See* App. A, at 1a-3a. Justice Papadakos filed a concurring and dissenting statement for himself and two other Justices, in which he expressed agreement with the Commonwealth Court's conclusion that, under PURPA, state utility commissions have "broad plenary power" to determine that a utility's submission of a contract for rate approval is the legal equivalent of a petition by the qualifying facility for the commission to compel the utility to enter into that contract. *Id.* at 16a-17a.[5]

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[5] Justice Papadakos argued, however, that the Commonwealth Court erred in requiring the PUC to utilize the February 25, 1987 Agreement date as the operative date for the calculation of West Penn's avoided capacity costs, and that the original 1986 calculations adopted in the Agreement should have been used instead. *Id.* at 16a. Apparently it was this issue that divided the Pennsylvania Supreme Court.

## REASONS FOR GRANTING THE WRIT

In *FERC* v. *Mississippi*, 456 U.S. 742 (1982), this Court upheld from constitutional challenge § 210 of PURPA, including its requirement that FERC promulgate rules governing the obligation of utilities to purchase power from qualifying cogeneration and small power production facilities, and the requirement that state utility commissions implement the FERC rules. One aspect of § 210 not specifically addressed in *FERC* v. *Mississippi* is its limitation on federal court jurisdiction to review the state utility commissions' implementation of PURPA and the FERC rules. *See* PURPA, § 210(g)(1), 16 U.S.C. § 824a-3(g)(1).[6]

In *American Paper Institute* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983), this Court approved the FERC rules requiring utilities to purchase electric energy from qualifying facilities at a rate equivalent to "full avoided costs," 18 C.F.R. § 292.304(b)(2), and requiring utilities to make interconnections with qualifying facilities, so as to effectuate mandated purchases and sales of electric energy, 18 C.F.R. § 292.303. In *American Paper Institute* this Court recognized that the full avoided cost rule for mandated purchases was not completely inflexible, in part because the FERC rules permit, and indeed encourage, "a qualifying facility and a utility [to] negotiate a contract setting a price that is lower than a full-avoided-cost rate." 461 U.S. at 416 (citing 18 C.F.R. § 292.301(b)(1)). With particular reference to the questions presented by this case, this Court held that "[t]he Commission's rule simply establishes the rate that applies in the absence of . . . a specific contractual agreement." *Id.*

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[6] Section 210(g)(1) of PURPA allows federal judicial review of proceedings conducted by state regulatory authorities under PURPA only to the extent such review may be obtained under 16 U.S.C. § 2633. The latter provision deprives the federal courts, except this Court, of jurisdiction over actions arising under subchapters I and II of PURPA, with limited exceptions designed to enforce certain procedural rights.

Since 1983, state utility commissions and state courts have been left without guidance from this Court, or from FERC, with respect to how PURPA's requirements are to be met in specific concrete circumstances.[7] As a result, conflicts abound, even on such basic questions as whether PURPA preempts the field, and precludes the states from enacting legislation that offers greater financial incentives to the developers of qualifying facilities by setting purchase rates at levels higher than a utility's avoided costs. *Compare Consolidated Edison Co.* v. *Public Serv. Comm'n*, 63 N.Y.2d 424, 483 N.Y.S.2d 153, 472 N.E.2d 981 (1984), *app. dismissed*, 470 U.S. 1075 (1985) (state law is not preempted) *with Kansas City Power & Light Co.* v. *Kansas Corp. Comm'n*, 234 Kan. 1052, 676 P.2d 764 (1984) (state utility commission precluded by PURPA from setting rates for purchases higher than utility's avoided costs). *See Consolidated Edison Co., supra*, 470 U.S. at 1075-78 (White & Blackmun, JJ., dissenting from dismissal for want of substantial federal question).

Moreover, as economic conditions have changed, and as utility predictions of their capacity needs and related avoided capacity costs have become more refined, numerous state courts and commissions have struggled with the extent to which PURPA either permits or requires state commissions to ensure that utility customers are not disadvantaged by long term contracts with qualifying facilities that turn out to require payments far in excess of avoided costs at the time of delivery. *See* note 12 *infra* (collecting cases). The issues presented by this case involve that question, as well as the question whether

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[7] In both *FERC* v. *Mississippi* and *American Paper Institute*, FERC participated in the proceedings as a party. Petitioners suggest that it would be appropriate in this case, arising from state proceedings in which FERC was not a party, for the Court to solicit the views of the Solicitor General as to the importance of the federal questions presented in this Petition from the perspective of FERC.

state commissions may disregard the terms of freely-negotiated contracts. These are important and recurrent questions of federal law that require this Court's attention to achieve some semblance of consistency among the fifty separate state regulatory and judicial systems that have been charged by Congress with implementing the federal mandates of PURPA.

When the Milesburg Agreement was negotiated and signed in February, 1987, West Penn projected that it would need additional "base load" capacity beginning in 1995, which it planned to supply by its share of three 300 megawatt coal-fired generating units, to be completed between 1995 and 1998. Based on that generation planning forecast, West Penn contracted for capacity charges to be paid to Milesburg at 3.3¢ per kilowatt hour. By the time the Agreement terminated in 1989, West Penn's forecasts had changed, and it then projected that it would require less expensive combustion turbine "peaking" units to meet future demand, and that it would not need to bring any such units on line until 1999.[8] If the capacity rates in the Milesburg Agreement had been based on that later projection, those rates would have been set at approximately 1.2¢ per kilowatt hour. The approximate 2¢ per kilowatt hour differential equates to reduced payments of $6 million per year, or roughly $180 million over the life of the Agreement.

The practical side of the legal issues presented by this Petition is whether West Penn and its customers, and similarly situated utilities and their consumers, should bear the risk of having to make massive overpayments to the developers of qualifying facilities, even where the alternative capacity those developers have contracted to deliver is no longer needed. The particular framework for these questions is a situation in which West Penn attempted to protect itself and its customers from that risk,

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[8] "Base load" is the amount of a utility's demand that is needed to be met on a nearly constant basis. "Peak load" is the highest point of demand over a given period of time.

through the negotiation of specific contractual milestone dates by which the facility in question had to be financed and built. But the Pennsylvania PUC and reviewing courts abrogated the parties' contract, misconstruing federal law to require that the qualifying facility be relieved of its contractual obligations, and that the risks of overpayment be placed on the utility and its customers.

## I. THE PENNSYLVANIA COURTS HAVE MISCONSTRUED THE PURPA REGULATIONS, AND DEVIATED FROM FEDERAL POLICY, BY EQUATING THE SUBMISSION TO THE PUC OF A FREELY-NEGOTIATED AGREEMENT FOR RATE APPROVAL WITH A PETITION FOR THE PUC TO ORDER A UTILITY TO ENTER INTO A CONTRACT WITH A QUALIFYING FACILITY.

The FERC regulations create an important role for the private negotiation of "PURPA contracts" between utilities and the developers of qualifying facilities. Section 292.301(b) of the FERC Rules states:

> "Nothing in this subpart:
>
> (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or
>
> (2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase."

In implementing the requirements of PURPA, the Pennsylvania PUC also adopted rules exempting negotiated contracts from the regulatory scheme. *See* 52 Pa. Code § 57.32(c) (1983), reprinted in App. R. The PUC's regulations not only track the language of § 292.301(b), but also add a requirement that "[e]ach utility shall file with the Commission a copy of any contract or agreement that it enters into with a qualifying facility with a design capacity of 500 kilowatts or more."

*Id.* § 57.32(c)(2). The state regulations also promised that "nothing in this subchapter will affect existing contracts or future contracts freely entered into by utilities and qualifying facilities," and that "[l]ong term contracts are encouraged." *Id.* § 57.32(a).

In *American Paper Institute*, this Court likewise recognized the key role that private contracts play under the regulatory scheme implemented by FERC: "Because the full-avoided-cost rule is subject to revision by the [FERC] as it obtains experience with the effects of the rule, it may often be in the interest of a qualifying facility to negotiate a long-term contract at a lower rate. The [FERC's] rule simply establishes the rate that applies in the absence of a waiver or a specific contractual agreement." 461 U.S. at 416.

In this case, respondent PUC and the Pennsylvania courts have eviscerated the federal policy favoring free negotiation of long term contracts between utilities and qualifying facilities by permitting a qualifying facility to walk away from its contractual obligation to comply with important milestone dates, but to retain nonetheless a purported federal statutory right to compel the utility to abide by all other terms of the contract. Under the principles adopted in this case, there ultimately is no distinction between a negotiated agreement and the mandatory contract that may be ordered by a regulatory commission under PURPA, and a qualifying facility may obtain the best features of both. Furthermore, any incentive for a utility even to attempt to protect its customers by negotiating for milestone dates has been destroyed.

Courts of last resort from other states have correctly interpreted the FERC rules, and maintained the distinction between negotiated contracts and commission orders to purchase power. For example, in *Public Utility Comm'n* v. *Gulf States Utilities Co.*, 809 S.W.2d 201 (Tex. 1991), the Supreme Court of Texas reversed a public utility commission's ruling that had disapproved a negotiated contract permitting the utility to recover from

its ratepayers contractual payments made to a qualifying facility in excess of avoided costs. The Court first held that the Texas PUC's avoided-cost rules, implementing PURPA, were completely inapplicable to voluntary agreements. 809 S.W.2d at 207-08. Moreover, the Court held, contrary to the decision in this case, that the FERC rules themselves did not grant state commissions any authority to regulate negotiated purchases: "Like the Texas regulations, the federal regulations do not authorize the Commission to alter the terms of a purchased power contract between a utility and a QF." *Id.* at 208.

As the *Gulf States* Court recognized, *id.* at 209, its holding was supported by decisions from other states as well. In *In re Vicon Recovery Systems,* 153 Vt. 539, 572 A.2d 1355 (1990), the Supreme Court of Vermont reviewed a decision of the state's Public Service Board, denying a request for approval of a negotiated agreement between a utility and a qualifying facility. The parties' contract, like the Agreement at issue here, required the Board's rate approval as a condition precedent to the contract taking effect. On appeal, the qualifying facility claimed that the Board was required by PURPA and the FERC rules to approve the contract; the utility contended that the contract was unenforceable because Board approval was a negotiated condition precedent to the contract taking effect. The Vermont Court rejected the qualifying facility's preemption claim because "[w]here voluntary power purchase contracts are involved . . . [FERC's regulatory] rate scheme is inapplicable, and we believe that state regulatory oversight must therefore be contemplated." 572 A.2d at 1358. The Court also upheld the decision of the Board to disallow the rate set by the contract because it was not "just and reasonable" in light of current economic conditions. *Id.* at 1360-61. If the PUC and the Pennsylvania courts had followed the *Vicon* approach in this case, they would have required the parties to abide by the negotiated contract, including the milestone dates, and determined capacity rates in a new mandated contract based on West Penn's avoided costs

as of the date of the PUC's order, rather than its avoided costs at the time of the lapsed contract.

In *Water Power Co.* v. *PacifiCorp*, 99 Or. App. 125, 781 P.2d 860 (1989), *review denied*, 309 Or. 291, 787 P.2d 887, *cert. denied*, 498 U.S. 811 (1990), a small power producer and a utility entered into a power purchase agreement that required, as a condition, the further agreement of two other utilities that would transmit the power produced by the qualifying facility to the purchaser. Despite extensive negotiations, the small power producer could not obtain timely agreement of all parties, and the purchaser argued that its agreement therefore was null and void. The small power producer filed a breach of contract action, and asked the trial court to instruct the jury that the utility was required by PURPA to purchase its power. The court refused the requested instructions and the jury found for the utility. The appellate court affirmed because, under PURPA and the FERC regulations, the parties to a negotiated agreement were free to "make contractual provisions on matters that the regulations and rules do not cover [including contractual deadlines for transmission agreements]." 781 P.2d at 864. Although *Water Power* involved a civil breach of contract action, rather than a utility commission's review of a negotiated contract, its analysis suggests that the Milesburg Agreement was null and void as of February 28, 1989, and that the PUC erred in failing to give effect to the freely-negotiated contractual provision that called for automatic termination upon the developer's failure to comply with a milestone date.

In *Bates Fabrics Inc.* v. *Public Utilities Comm'n*, 447 A.2d 1211 (Me. 1982), the Supreme Judicial Court of Maine reviewed a determination by that state's PUC that it had no jurisdiction to review the price for power set by a contract between a utility and a small power producer. The contract in question was executed prior to the enactment of PURPA. The small power producer petitioned the PUC to "reform" the contract and require the purchasing utility to pay an amount equal

to its avoided costs. The Court held that "no language in the statute, rules, or legislative history of section 210 of the PURPA . . . would suggest that Congress intended a state regulatory agency to have the authority to revise binding contractual provisions concerning the rate of purchase between a utility and a qualifying small facility." 447 A.2d at 1214. The Court further concluded "that the federal scheme expressly excludes from its reach all otherwise binding contracts between utilities and cogenerators or small power producers, and that the Maine PUC therefore correctly determined that it had no Congressionally delegated authority to decide the issue presented by Bates." *Id.* Under similar circumstances in this case, the Pennsylvania courts determined that PURPA creates a "broad mandate" for state regulatory commissions to "reform" or abrogate the terms of freely-negotiated contracts between utilities and qualifying facilities.

Each of the decisions cited herein adopted as a controlling legal principle the notion that PURPA and the FERC rules carve out an area for the private negotiation of contracts, the terms of which are binding on qualifying facilities. In *Gulf States* and *Vicon,* in particular, the state commissions were asked to approve the terms of such negotiated agreements. The Supreme Courts of Texas and Vermont did not adopt the rationale of the Pennsylvania Commonwealth Court in this case—that a contractual provision calling for advance rate approval of a private contract gave the commission a license under PURPA to "reform" the contract by ignoring or invalidating the terms to which a qualifying facility had agreed. Indeed, those courts explicitly rejected the notion that PURPA and the FERC regulations mandate commission oversight of freely-negotiated contracts.

The Pennsylvania courts have misinterpreted federal law by: (1) dissolving the distinction between freely-negotiated agreements and federally-mandated orders to purchase, a distinction which is clearly drawn in the FERC rules; (2) allowing qualifying facilities to

avoid their contractual obligations designed to protect a utility and its customers; and (3) granting the Pennsylvania PUC a broad mandate to "reform" negotiated contracts by rewriting them to comply with a misguided notion of what federal PURPA policy requires. The clear conflict over this question among state courts of last resort, and the absence of any other forum for the resolution of this important issue of federal law, warrants plenary review by this Court.

## II. IN MISINTERPRETING THE CIRCUMSTANCES UNDER WHICH A QUALIFYING FACILITY HAS A LEGALLY ENFORCEABLE OBLIGATION TO DELIVER ENERGY TO A UTILITY, THE PENNSYLVANIA COURTS HAVE FAILED TO ABIDE BY PURPA'S REQUIREMENTS THAT THE RATES FOR PURCHASES OF POWER MANDATED BY THE STATUTE "SHALL BE JUST AND REASONABLE TO THE . . . CONSUMERS OF THE ELECTRIC UTILITY" AND SHALL NOT EXCEED THE UTILITY'S "INCREMENTAL COST."

Although Congress intended by enacting PURPA to create conditions in which cogenerators and small power producers could more readily sell their power to utilities, the statute expressly provides that a utility's ratepayers are not required to subsidize those sales. Thus, § 210 (b)(1) of PURPA states that the rates established by FERC for purchases of power from qualifying facilities "shall be just and reasonable to the electric consumers of the electric utility and in the public interest . . . ." 16 U.S.C. § 824a-3(b)(1). Moreover, FERC was expressly admonished that "[n]o such rule prescribed [for the purchase of power] shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b). The FERC rules follow these requirements to the letter, repeating the statutory commands that rates shall "[b]e just and reasonable to the electric consumer," and that the rules do not require "any electric utility to pay more than the

avoided costs for purchases." 18 C.F.R. § 292.304(a).[9] In *American Paper Institute, supra,* this Court upheld the FERC rules that had set the purchase rate for energy supplied by qualifying facilities at the statutory maximum, as a reasonable reconciliation of Congress' goals of encouraging cogeneration and small power production, while not penalizing the interests of consumers. *See* 461 U.S. at 412-18.

The mechanics of the rate setting rules adopted by FERC are tied to the timing of the qualifying facility's actual delivery of energy to the purchasing utility or the existence of a "legally enforceable obligation" to deliver. 18 C.F.R. § 292.304(d). For a qualifying facility such as Milesburg that chooses to sell both energy and capacity to a utility over a specified term, the rules provide:

> [T]he rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) *The avoided costs calculated at the time the obligation is incurred.*

18 C.F.R. § 292.304(d)(2) (emphasis added).

In the parties' 1987 Agreement, and in the proceedings before the PUC and Pennsylvania courts, Milesburg chose to have capacity rates calculated based on West Penn's avoided costs "at the time the obligation is incurred." The critical question of federal law presented by the PUC's order and the Commonwealth Court's decision, however, is *when* the obligation was incurred. As described above, if the PUC and Commonwealth Court had determined that Milesburg's legally enforceable obligation to deliver energy and capacity to West Penn was in-

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[9] The FERC rules make clear that "avoided costs" and "incremental costs of alternative electric energy" are equivalent. 18 C.F.R. § 292.101(b)(6); *see American Paper Institute, supra,* 461 U.S. at 406.

curred as of the date of the PUC's order in September 1989, rather than the date of the lapsed contract in February 1987, West Penn's avoided costs over the term of the mandated contract would be calculated at $180 million less than what the PUC has required. The PUC's decision to require West Penn to enter into a new contract, using the same capacity rates as those set in the terminated Agreement, therefore created a $180 million windfall for Milesburg, and will result in rates that are neither "just and reasonable" to West Penn's customers, nor less than West Penn's "incremental cost," as § 210(b) of PURPA requires.[10] The decisions of the PUC and the reviewing Pennsylvania courts have given no weight at all to these fundamental statutory requirements.

Other courts, in similar circumstances, have properly taken § 210(b) of PURPA into account. For example, in *Vicon, supra,* the Vermont Supreme Court adopted the view that where a privately-negotiated agreement was conditioned on approval by the state's Public Service Board, the qualifying facility had no "legally enforceable obligation" to deliver power until that approval had been obtained. As a result, it was the time of regulatory approval, and not the date of the contract's execution some four years earlier, that controlled the Board's determination of the utility's avoided costs. *See* 572 A.2d at 1360. This interpretation of the parties' agreement, informed by PURPA and the FERC rules, allowed the Public Service Board to judge the reasonableness of the rates in the light of current economic conditions, and to determine correctly that the rates no longer were "just and reasonable." *Id.*

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[10] In fact, the PUC and Commonwealth Court created an additional windfall for Milesburg by granting its request for an adjustment, *increasing* the capacity credits called for in the 1987 Agreement because of the later dates for payment necessitated by Milesburg's inability to complete construction and commence delivery in accordance with the Agreement's milestone dates. *See* App. B, at 41a.

In a subsequent case, the same court upheld a decision by the Public Service Board to deny a required "certificate of public good" for a proposed cogeneration facility based on a determination that the scheduled payment rates, although consistent with the utility's avoided costs at the time of the contract, were excessive under current "marketplace realities." *Petition of East Georgia Cogeneration,* 158 Vt. 525, 614 A.2d 799, 803 (1992). The Court rejected the cogenerator's argument that to deny approval of agreed contract rates based on "changed circumstances" violated PURPA and the FERC rules. The Court reasoned that "neither the federal statute nor the regulations require utilities to purchase power at a price above actual avoided cost." *Id.* at 804. Contrary to the approach adopted in this case by the PUC and the Pennsylvania courts, the Vermont Supreme Court affirmed its Board's policy that "current market conditions 'must remain the ultimate test of whether a proposed power sale (particularly one that is mandatory for the utilities under federal and state law) is in the general good of the state.'" *Id.* The Court found "no error in the Board favoring concern for ratepayers over concern for return on the investment of entrepreneurs where, as here, the proposed project seeks rates higher than those mandated by federal law." *Id.*[11]

The Idaho Supreme Court recently reached a similar result in *A.W. Brown Co.* v. *Idaho Power Co.,* 121 Idaho 812, 828 P.2d 841 (1992). In *Brown,* a small power

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[11] In *East Georgia,* one Justice filed a concurring opinion in which he reasoned that PURPA would have required the acceptance of the contract rates if the cogenerator had at the time of contracting entered into a "legally enforceable obligation" to deliver energy to the utility. However, that Justice believed that the parties' contract did not create a "legally enforceable obligation" because it was conditioned on Board approval. *See* 614 A.2d at 807-08 (Moore, J., concurring). The PUC and the Pennsylvania courts in this case determined not only that a lapsed contract created a "legally enforceable obligation," but also refused to look at current market conditions in mandating that West Penn pay the capacity rates established by the terminated agreement.

producer sought to require a utility to purchase hydroelectric energy in accordance with its published standard rates for qualifying facilities. Despite the fact that the producer had attained qualifying status under PURPA, its negotiations with the utility had not reached the stage where it was bound to deliver power to the utility at the standard rate. The Idaho PUC and the state's Supreme Court determined that there could be no "legally enforceable obligation" under the FERC rules until the facility was legally committed to deliver its power. The Court adopted the Idaho PUC's reasoning that, otherwise, "a project developer could lock in a rate in the year of its QF certification, but not begin producing power for several years after, by which time utility avoided costs may well have declined." 828 P.2d at 847. The Idaho Supreme Court refused to countenance a situation in which ratepayers could be required to pay more than a utility's *current* avoided costs, in violation of § 210(b) of PURPA. *Id.*

Under the approaches to PURPA § 210(b) and the FERC rules adopted by the Supreme Courts of Vermont and Idaho, West Penn could not have been ordered in September, 1989, to enter into a new contract with Milesburg calling for capacity payments that were far in excess of its then-current avoided capacity costs. The PUC and Pennsylvania courts have misconstrued the requirements of federal law, and achieved a result that will cost West Penn's customers $180 million for capacity that is no longer needed.

Pinpointing when a utility incurs a "legally enforceable obligation" has become dramatically more significant in recent years, as a confluence of economic factors has sharply reduced the avoided costs of electric energy—contrary to earlier expectations of utilities, developers of qualifying facilities, state commissions, and Congress itself. Congress enacted PURPA in response to the energy crisis of the 1970s, with the expectation that alternative energy sources would reduce the nation's dependence on

increasingly more expensive foreign oil. Congress also commanded in PURPA, however, that consumers *not* bear the burden of encouraging cogeneration or small power production. FERC's "legally enforceable obligation" rule readily served both PURPA policies (encouragement of alternative energy production and ratepayer neutrality) so long as avoided costs of electricity were rising: Utility customers were not harmed if avoided costs were calculated upon a "legally enforceable obligation" accruing prior to delivery. But in a falling avoided-cost market, customers can be prejudiced by an interpretation of the FERC rule favoring developers, and state courts and public utility commissions have struggled to reconcile the congressional policies with the ambiguous FERC rules.[12]

Because of the peculiar jurisdictional provisions of PURPA, *see* note 6 *supra*, where state tribunals are principally responsible for implementing federal law, this Court's guidance is required to resolve these important and recurring policy questions. This Court should accept plenary review of this case to reconcile the conflicting

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[12] In addition to the cases described in the text, *compare Long Island Lighting Co.* v. *Public Serv. Comm'n*, —— N.Y.S.2d ——, 1993 W.L. 540079 (3d Dep't 1993) (declining to apply higher avoided-cost rates predicated on erroneous assumption of utility's need for additional capacity because rates would not be "just and economically reasonable" to ratepayers in current market) *and Xiox Corp.* v. *Public Serv. Comm'n*, 190 A.D.2d 350, 598 N.Y.S.2d 821 (3d Dep't) (declining to apply higher avoided-cost rates predicated on erroneous forecast of the effect Gulf War would have on oil prices), *appeal dismissed*, 82 N.Y.2d 790, 604 N.Y.S.2d 551, 624 N.E.2d 688 (1993) *with Appeal of Public Serv. Co. of New Hampshire*, 130 N.H. 285, 539 A.2d 275 (1988) (applying higher avoided-cost rates from past notwithstanding intervening decline in price of oil and avoided costs) *and Smith Cogeneration Mgmt., Inc.* v. *Corporation Comm'n*, 863 P.2d 1227 (Okla. 1993) (state rule requiring qualifying facilities and utilities to include in their contracts a provision permitting commission to revise rates throughout the duration of the contract held preempted by PURPA and FERC rules, notwithstanding that rule was promulgated to assure just and reasonable rates to consumers).

approaches of state courts to the question of what constitutes a "legally enforceable obligation" under the FERC rules, and how those rules should be interpreted consistent with the statutory commands that rates are to be "just and reasonable," and shall not exceed "incremental cost."

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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